

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JULIANN CLAYTON MORLAND DAVEE

Claimant

V.

KANSAS LEGAL SERVICES

Respondent

AND

QBE THE AMERICAS

Insurance Carrier

Docket No. 1,072,118

ORDER

STATEMENT OF THE CASE

Claimant appealed the June 24, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Pamela J. Fuller. Paul V. Dugan, Jr., of Wichita, Kansas, appeared for claimant. Anton C. Andersen of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 7, 2015, discovery deposition of claimant and exhibit thereto; the transcript of the February 26, 2015, deposition of claimant and exhibits thereto; the transcript of the February 27, 2015, deposition of Dr. Donald L. James and exhibits thereto; the Joint Stipulation of Evidence for Consideration at Preliminary Hearing (Joint Stipulation of Evidence) filed by the parties with the Division of Workers Compensation on May 12, 2015; and all pleadings contained in the administrative file.

ISSUES

Claimant alleges she sustained personal injury by accident or injury by repetitive trauma due to sewer gas exposure during April to early May 2014 and mold exposure through June 2014 at respondent's building. The ALJ ruled claimant failed to prove she sustained a personal injury or an occupational disease arising out of and in the course of her employment.

Claimant requests the Order be reversed, arguing she met her burden of proof. At a minimum, claimant requests the Board remand this matter to the ALJ to order an

independent medical examination to determine causation. Respondent maintains the Order should be affirmed.

The sole issue is: did claimant sustain a personal injury by accident, repetitive trauma or an occupational disease arising out of and in the course of her employment?

FINDINGS OF FACT

Claimant, an attorney, began working for respondent in October 2010. In the spring of 2012, she began working at respondent's Military Plaza office in Dodge City. Claimant's office was next to Timothy Woods' office.¹ At the end of April 2014, claimant had burning eyes and noticed a strong smell of rotten eggs in the office, which was attributed to a gas/chemical leak. She later learned sewer pipes were leaking because they had not been properly capped. The rotten eggs smell lasted two weeks. After the rotten eggs smell dissipated, claimant's eyes quit burning. Claimant did not seek medical treatment during her sewer gas exposure.

Claimant indicated that in May 2014 she first noticed symptoms that she attributed to mold. At her January 2015 deposition, claimant testified the symptoms she was currently experiencing that she attributed to mold exposure at respondent were burning eyes, nose, throat and skin; headaches; migraine headaches; dizziness; digestive problems; stomach pain; memory problems and an inability to walk and talk. She also testified she experiences heart palpitations, muscle aches and joint pain. Claimant indicated several coworkers also experienced similar symptoms.

On May 16, 2014, claimant saw nurse practitioner Janet Cochran and reported being exposed to a gas leak at work on May 13, 2014. Claimant reported that three days before her appointment, she developed episodes of dizziness, the frequency of which was essentially constant, but variable in intensity and lasting one to two hours. Claimant also reported having generalized abdominal pain that began two days earlier. On June 5, 2014, claimant again saw Ms. Cochran and reported having a sore throat, abdominal pain, fatigue, dizziness and diffuse joint aches, which began several weeks earlier. Claimant underwent an abdominal ultrasound that was normal.

Claimant recalled having incidents in May and August 2014 where she could not read or speak for a day, but did not seek medical treatment for that. At least twice a month, she has episodes where she cannot walk and she also has frequent occasions when it is difficult to walk.

Claimant indicated she has memory lapses every day since working in respondent's Military Plaza office and they have continued and are steady, but confirmed she has never

¹ Claimant indicated Mr. Woods was the managing attorney.

been tested for memory loss. Claimant testified she had constipation during the time she worked in Military Plaza and the constipation ended when she no longer worked there.

Claimant indicated she did not have any of the foregoing medical conditions prior to working at Military Plaza except for migraines and heart palpitations. She does not experience any of the symptoms while outdoors, except headaches; being outside does not cause her headaches. She also suffers from Celiac disease, or gluten intolerance, and extreme fall allergies, but had never had an allergy test. Claimant has experienced migraine headaches since the eighth grade. She testified the frequency of such headaches increased between 2012 and 2014, but their intensity has remained constant since the mid-2000s, when she saw a migraine specialist. At her February 26, 2015, deposition in her attorney's office, claimant testified she felt as if her face was on fire, her ears were full and her head was pounding.

Claimant acknowledged her dizziness commenced in 2012 or 2013 and in 2013, she saw a physician assistant for dizziness and anxiety. Claimant testified she has dizziness at least twice a week and at her January 7, 2015, deposition testified she experienced dizziness in respondent's current office. She has experienced dizziness while working for Habitat for Humanity, in old buildings, courthouses, new buildings, and when around strong chemicals for long periods of time. Her dizziness occurs at different times of day. She has had heart palpitations since high school, but indicated that since April 2014 she has heart palpitations when she has dizziness and burning eyes.

Sometime during the third or fourth week of May 2014, claimant's office was moved to the second floor of Military Plaza. If claimant had to go to the first floor to retrieve files, she wore a mask and had burning eyes, nose and throat, as well as headaches and dizziness. She last went to the first floor at the end of May or the first part of June 2014.

At the end of May 2014, respondent's landlord showed claimant mold in the ceiling and walls of the building. The mold was black, was three feet by three feet in size and was on concrete in Mr. Woods' office. Mr. Woods told claimant mold was also discovered in the reception area duct. According to claimant, two companies tested for mold.

In mid-June 2014, claimant began working from her home and never returned to respondent's offices in Military Plaza. According to claimant, respondent moved its office from Military Plaza to another location because employees were getting sick. While working at home, claimant had burning eyes there. At the end of July, while working at home, claimant began having burning skin, which she attributed to working with case files from respondent's offices.

EMLab P&K performed a spore trap analysis at respondent's office on May 28, 2014. Testing showed the outside spore count was 2,200 m³ (per cubic meter) and 27 m³ in respondent's offices.

An investigator for Terracon performed a mold assessment at respondent's office on June 23, 2014. The reception area had visible water damage on ceiling panels from a leaking air conditioning unit. There was a two-square-foot area of mold growth inside the air conditioner. The plenum space above Mr. Woods' office showed signs of prior water damage and discoloration and rusting on pipes in the plenum. Test results showed spore or fungi count of 347 m³ in the reception area, 170 m³ in Rebecca Azua's office, 127 m³ in Mr. Woods' office and 147 m³ in claimant's office, but at 52,850 m³ outside. Air sampling suggested an outdoor source for spores, rather than spores released from indoor fungal growth, although there was visible fungal growth indoors. Terracon suggested the leak be repaired and the air conditioner be replaced or mold growth remediated. Claimant testified the area with the mold was cleaned by bleaching the wall.

According to claimant, her family physician, Dr. Lisa Salvador, made the connection between claimant's symptoms and the mold. Claimant did not know how the mold got into her body, the type of mold or the extent of the mold.

Claimant saw Dr. M. H. V. Strickland on July 7, 2014. Claimant reported having very bad symptoms since May 12, 2014, of anxiety, heart palpitations, joint pain in her knees, stomach issues, stuffy nose, headaches, worsening migraines, dizziness, an inability to speak at times, popping and ringing ears that felt full and dry eyes. Claimant testified the doctor provided her a list of supplements she should take and a prescription for cholestyramine, a cholesterol medication that binds to her toxins and gets them out of her system.

Dr. Strickland conducted an inhalant panel where he exposed claimant to approximately 80 different allergens, including 16 varieties of mold spores by pricking her back. Unfortunately, the doctor did not explain the test results. One of Dr. Strickland's diagnoses was "Question Environmentally induced illness."² Dr. Strickland's notes indicated claimant was allergic to indoor molds; if she got out of her toxic environment, she would get better and she had building-related symptoms that may be due to water or dampness in the office and resultant microbial growth.

Claimant testified she was treated by Dr. Donald L. James with antifungal medications, thyroid medication and thyroid testing. She testified the course of treatment had not improved her medical conditions and her symptoms were not getting better. Claimant believes something in Military Plaza made her sick, her immune system has been affected and she continues to have symptoms.

Dr. James, an otolaryngologist and board certified in allergies with an emphasis on allergy and immunology, first saw claimant on September 18, 2014. The doctor saw claimant a total of three times. Claimant reported having muscle aches, at times not being

² Joint Stipulation of Evidence, Strickland records.

able to think clearly, having problems speaking, digestive issues, headaches and dizziness that she related to her office environment, but only in recent months. Claimant indicated she had hay fever her entire life, but only became aware of congestion recently. Dr. James treated claimant with lubricator decongestants, probiotics and an antifungal medication. Dr. James indicated the first time claimant returned to see him, her GI tract was greatly improved, which, in part, was due to a diet change. The doctor also indicated they were working on claimant's hypothyroid condition. He noted that by her third visit, claimant significantly improved. Dr. James was unaware claimant testified her symptoms were exactly the same as earlier.

Dr. James testified that when he saw claimant on February 26, 2015, she was doing better not being exposed to mold and correcting her diet by taking the mold out. The doctor explained that eating cheese and gluten products makes claimant bloat and gives her hay fever problems. The doctor testified claimant's "immune system was being overburdened, and that we would want to decrease that exposure and treat her immune system and build her up."³ The doctor recommended claimant be treated by medications for her symptoms, removing her from the exposure, building up her immune system through diet, handling her respiratory problems and supporting her hormone deficiencies.

Dr. James opined there was a causal connection between claimant's medical condition and her work activities and work environment in 2014. When asked if the events in May 2014 overburdened claimant's system and she is still having residuals, the doctor testified, "I am saying the association is pretty high."⁴ With regard to prevailing factor, the doctor testified:

Q. And, therefore, could you specifically state whether you think the prevailing factor is her exposures to the sewer gas and the mold that was discovered in her work environment and the work activities that she performed?

A. With those factors, in my logic, that would be what is burdening her immune system and the cascade of symptoms that occurred.⁵

According to Dr. James, mold will burn an individual's immune system and the person's body reacts by producing mucus. He indicated some of the symptoms to mold exposure are headaches, sore throats, earaches and sinus issues. The doctor indicated the symptoms can extend beyond the respiratory system. Dr. James indicated he had treated patients exposed to sewer gases and the symptoms could be the same as being exposed to grass, trees, weeds, pollens and dog and cat dander.

³ James Depo. at 24.

⁴ *Id.* at 56.

⁵ *Id.* at 28-29.

Dr. James confirmed he had none of claimant's pre-May 2014 medical records. The doctor acknowledged he did not know how claimant was exposed to the mold, how long she was exposed, when she was last exposed, the mold concentration levels and the mold genus or species. Nor did he know the mold levels claimant was exposed to at her home or where she currently works. The doctor agreed some molds cause problems and others do not. Respondent's attorney proffered claimant was exposed to the *Alternaria* genus of mold, and the doctor agreed he did not know to which specific *Alternaria* mold claimant was exposed.

At his deposition, Dr. James was asked to review the inhalant panel conducted by Dr. Strickland. Dr. James explained the higher the test result number, the higher response in sensitivity to the allergen for which the person was tested. Claimant's inhalant panel showed she had the same or a higher heart response to the following allergens than to any of the 16 mold varieties to which she was exposed in the test: histamine, short ragweed, giant ragweed, cocklebur, marsh elder, pigweed, *Kochia Scoparia*, hickory mix, red cedar/juniper, bermuda, red top, western ragweed, sagebrush, water hemp, corn pollen, wheat and brome grass.

At the request of respondent, Dr. Allen J. Parmet, board certified in occupational and aerospace medicine, reviewed claimant's medical records, her January 7, 2015, deposition and the Phoenix Restoration and Terracon reports. Dr. Parmet noted Dr. Strickland performed a number of skin tests that identified a positive reaction to cat hair, cockroach, ragweed, cocklebur, marsh elder, pigweed, Russian thistle, sweet gum, hickory, juniper, black walnut, Bermuda grass, corn, wheat, wheat grass, berm grass, black willow, alder and rabbit. Claimant was tested for her reaction to 16 mold spores and reacted weakly positive to five. Dr. Parmet opined:

The plethora of symptoms are unsupported by any medical findings. The active findings by Dr. Strickland would suggest environmental sensitization with dermatitis and classic allergy, which is readily treated; however, Ms. Morland-DaVee feels she has been sensitized to many agents, which are clearly not present in her workplace and, in fact, the environmental sampling clearly demonstrates that the levels were much higher outside her office than inside.⁶

Dr. Parmet stated that office employees are at no greater risk for exposure to molds than any other worker or person who lives inside. He noted the present alarm over exposure to molds in the indoor environment stems from the belief that inhaling mycotoxins causes symptoms, but that current scientific evidence does not support that theory. The doctor concluded there was no causal connection between claimant's employment and her symptoms.

⁶ Joint Stipulation of Evidence, Parmet Report at 5.

The preliminary hearing Order states:

After review of all the evidence presented, it is found that the claimant did not meet with personal injury arising out of and in the course of her employment, nor did she acquire an occupational disease. The claimant has failed to meet her burden of proof. She has failed to prove that any condition she is suffering from resulted from exposure to mold or sewer gas in her work environment. The claimant did not work in the office at Military Plaza on a full time basis. Her work did not create any special hazard or risk. The other locations that she worked at were not tested for mold nor was her home. Many of the claimant's symptoms pre-existed her alleged mold exposure. Prior to April of 2014, the claimant suffered from migraines, dizziness, was anxious, had heart palpitations, hay fever, and had been diagnosed with Celiac's disease. Dr. Parmet determined that there is no causal connection with the claimant's symptoms and her employment. Dr. Parmet if *[sic]* found to be the most reliable as Dr. James is relying on studies that are not scientifically based.⁷

PRINCIPLES OF LAW AND ANALYSIS

An employer is liable to pay compensation to an employee incurring personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment. Claimant must prove her right to an award based on the whole record using a "more probably true than not true" standard.⁸

K.S.A. 2013 Supp. 44-508 states in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

⁷ ALJ Order (June 24, 2015) at 8-9.

⁸ K.S.A. 2013 Supp. 44-501b(c) and K.S.A. 2013 Supp. 44-508(h).

K.S.A. 2013 Supp. 44-5a01(b) provides in relevant part:

“Occupational disease” shall mean only a disease arising out of and in the course of the employment resulting from the nature of the employment in which the employee was engaged under such employer, and which was actually contracted while so engaged. “Nature of the employment” shall mean, for purposes of this section, that to the occupation, trade or employment in which the employee was engaged, there is attached a particular and peculiar hazard of such disease which distinguishes the employment from other occupations and employments, and which creates a hazard of such disease which is in excess of the hazard of such disease in general. The disease must appear to have had its origin in a special risk of such disease connected with the particular type of employment and to have resulted from that source as a reasonable consequence of the risk. Ordinary diseases of life and conditions to which the general public is or may be exposed to outside of the particular employment, and hazards of diseases and conditions attending employment in general, shall not be compensable as occupational diseases

This is a close case and the evidence is nebulous and often contradictory. Claimant worked at Military Plaza from sometime in the spring of 2012 until June 2014. Claimant reported numerous and varied symptoms, but few of them commenced until April 2014, when the sewer gas leak occurred. At her February 26, 2015, deposition, claimant indicated she still had many of the symptoms she had while working in Military Plaza. Yet, Dr. James indicated he was told by claimant her symptoms were significantly improved. To this Board Member, it does not seem credible that at least some of claimant's symptoms were not better after no longer being exposed to the sewer gas and mold for over six months.

Dr. James opined there was a causal connection between claimant's medical condition and her work environment, but did not specifically testify claimant's work environment was the prevailing factor for claimant's medical condition. Dr. James' opinions are jaundiced by the fact he never reviewed any of claimant's pre-May 2014 medical records, did not know how claimant was exposed to the mold, how long she was exposed, when she was last exposed, the mold concentration levels, the mold genus or species, or the mold levels claimant was exposed to at her home and where she currently worked. Dr. James' opinion relies almost exclusively on claimant asserting her “cascade” of symptoms was caused by mold exposure. Dr. James reviewed and explained the test result numbers of Dr. Strickland's inhalant panel. Those test results indicated claimant had a higher heart response to more than 15 allergens than she did to 16 mold spore varieties.

Military Plaza was tested for mold twice, but the test results are of little help. There is no testimony from any person to indicate whether the mold spore levels detected during the two tests are normal, below normal or above normal.

Dr. Parmet never evaluated claimant and never addressed the impact of her sewer gas exposure. He indicated the present alarm over exposure to molds in the indoor

environment stems from the belief that inhaling mycotoxins causes symptoms, but that current scientific evidence does not support that theory. Thus, Dr. Parmet appears to be of the opinion that mold exposure rarely or never causes symptoms.

This case boils down to whether claimant proved by a preponderance of the evidence that her exposure to mold was the prevailing factor causing her medical conditions and need for medical treatment. This Board Member, at this juncture of the proceedings, finds claimant has failed to meet that burden.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹⁰

WHEREFORE, the undersigned Board Member affirms the June 24, 2015, preliminary hearing Order entered by ALJ Fuller.

IT IS SO ORDERED.

Dated this ____ day of August, 2015.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Pamela J. Fuller, Administrative Law Judge

⁹ K.S.A. 2014 Supp. 44-534a.

¹⁰ K.S.A. 2014 Supp. 44-555c(j).